

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs February 13, 2007

CHRISTOPHER F. WADDELL v. STATE OF TENNESSEE

Appeal from the Criminal Court for Sumner County
No. 529-2005 Jane W. Wheatcraft, Judge

No. M2006-01505-CCA-R3-PC - May 22, 2007

The petitioner pled guilty to two counts of aggravated assault, four counts of attempted aggravated robbery, and three counts of coercion of a witness, stemming from three separate indictments. As part of the plea agreement, the petitioner received a six-year sentence for each attempted aggravated robbery conviction to be served concurrently. The trial court determined the petitioner's sentence with regard to the remaining convictions in a separate sentencing hearing. At the conclusion of the hearing, the trial court sentenced the petitioner to an effective sentence of thirty years. The petitioner filed a petition for post-conviction relief. Following a hearing, the post-conviction court denied the petition. On appeal, the petitioner argues that his plea was not made knowingly and voluntarily due to ineffective assistance of counsel. We have reviewed the record and found that trial counsel's performance was constitutionally adequate and that the petitioner's guilty pleas were knowing and voluntary. Therefore, we affirm the decision of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which DAVID G. HAYES, and J. C. McLIN, JJ., joined.

Michael T. Pickering, Gallatin, Tennessee, for the appellant, Christopher F. Waddell

Paul G. Summers, Attorney General and Reporter; Preston Shipp, Assistant Attorney General; Lawrence Ray Whitley, District Attorney General; and Thomas Boone Dean, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

This court recited the following facts on the petitioner's direct appeal:

The effective thirty-year sentence at issue in this case arose from three separate indictments. On August 7, 2001, the Appellant was involved in an altercation with Jeffrey Sparks in a Portland, Tennessee parking lot. During the incident, the Appellant confronted Sparks and then struck him in the head with a wooden stick. The injuries to the victim required medical attention. On November 8, 2001, a Sumner County grand jury returned an indictment in case number 903-2001 against the Appellant charging him with aggravated assault by use of a deadly weapon.

Case number 12-2002 stems from the Appellant's involvement in several aggravated robberies at the Lake D'Ville Apartments in Hendersonville, Tennessee. On September 5, 2001, the Appellant, along with three co-defendants, each armed and wearing ski masks, entered an apartment where a party was in progress. The armed intruders forced those present to lie on the floor while they stole jewelry, marijuana, and money. As the defendants fled the scene, they were chased by a neighbor on foot. Upon reaching the getaway car, the Appellant turned and fired a shot from his weapon. Following an investigation, the police arrested the Appellant, Mark Sampson, Chad Holmes, and David Lane. A Sumner County grand jury returned an eighteen-count indictment against the Appellant and the co-defendants on January 10, 2002, which included charges of aggravated robbery, kidnapping, aggravated assault, FN1 and unlawful discharge of a weapon. When interviewed, co-defendant David Lane confessed to the crime and implicated the Appellant, Sampson, and Holmes. Sampson and Holmes eventually also confessed their involvement. Each received reduced sentences for their cooperation.

FN1. This charge stemmed from the Appellant's firing of his weapon while in flight from the indicted robberies, causing the victim, Matt Burns, to "fear imminent bodily injury by use of a deadly weapon."

Case number 291-2003 arose from three separate criminal acts which occurred while the Appellant was incarcerated on the charges arising from his indictment in case number 12-2002. Two of the charges stem from letters written on June 4, 2002, and February 28, 2003, attempting to influence the testimony of potential witnesses in case number 12-2002. The first was a threatening letter written to co-defendant David Lane after he agreed to testify against the Appellant. The second involved a letter written to Jason Cross soliciting his help in a planned assault of co-defendant Mark Sampson. The last instance arose from an assault and verbal threats by the Appellant against Sampson in the laundry room of the jail on March 28, 2003. On April 10, 2003, a Sumner County grand jury returned an indictment against the Appellant charging him with three counts of coercion of a witness.

On September 11, 2003, the Appellant, under the terms of the plea agreement, pled guilty to aggravated assault in case number 903-2001, four counts of attempted aggravated robbery and one count of aggravated assault in case number 12-2002, and three counts of coercion of a witness in case number 291-2003. The plea agreement provided that the Appellant would receive a six-year sentence for each of the four counts of attempted aggravated robbery, with all four counts to be served concurrently. With respect to the remaining charges, the agreement provided that these sentences and the manner of service of the sentences would be determined by the trial court. Additionally, the trial court would determine whether the “open plea” sentences would be served concurrently or consecutively.

A sentencing hearing was held December 3 and December 16, 2003. The court heard testimony from various witnesses. The twenty-five-year-old Appellant acknowledged that he had owned several weapons and had used and sold drugs for approximately five years. Testimony was also presented regarding the Appellant’s criminal past, including testimony that the Appellant was involved in drive-by shootings in Florida. One witness, Carey Gallagher, testified that she was the victim of an aggravated assault by the Appellant. Ms. Gallagher related that she and the Appellant attended the same party in Portland, but the Appellant was asked to leave. Shortly thereafter, a drive-by shooting occurred. At the hearing, the Appellant admitted that he had fired the shots. Gallagher further testified that she saw the Appellant in the front yard after the shooting, and, following an altercation with the Appellant, he slammed her head into the windshield of a car, requiring medical attention.

In addition, the State introduced letters written by the Appellant while he was in jail. The letters contained numerous threats, as well as several references to guns, violence, and smuggling illegal drugs into the jail. Photographs were also admitted of graffiti authored by the Appellant on the wall of his cell. The text of these messages, which the Appellant admitted writing, involved threats directed at the co-defendants in the robbery case. A tape of a phone conversation by the Appellant shortly before the sentencing hearing was admitted, during which he threatened a police detective. The Appellant also admitted that he wrote a letter to the jail administrator weeks before the sentencing hearing in which he stated that “[he] can’t be broken.”

At the conclusion of the hearing, the trial court imposed maximum six-year sentences for each of the two aggravated assault convictions. The court also imposed the maximum sentence of four years for each of the four counts of coercion of a witness and sentenced the Appellant, as agreed, to concurrent six-year sentences for the attempted aggravated robbery convictions. The court then determined that all the sentences, with the exception of the attempted aggravated robbery sentences, were to be served consecutively, resulting in an effective sentence of thirty-years. Finally,

the trial court determined that the Appellant was not an appropriate candidate for any type of alternative sentencing and that the sentences should be served in confinement.

State v. Christopher Franklin Waddell, No. M2004-00126-CCA-R3-CD, 2005 WL 176495, at * 1-2 (Tenn. Crim. App., at Nashville, Jan. 27, 2005), perm. app. denied, (Tenn. May 23, 2005).

The petitioner filed a pro se petition for post-conviction relief on July 21, 2005. Counsel was appointed, and the petitioner filed an amended petition on May 5, 2006. Nine issues were included in the petition.

Post-conviction Hearing

At the post-conviction hearing held on June 2, 2006, post-conviction counsel presented three issues to the post-conviction court as grounds for post-conviction relief: (1) ineffective assistance of counsel; (2) the witnesses were not sequestered during the sentencing hearing; and (3) the petitioner was indicted for two Class D felony coercion charges and two Class E felony attempted coercion charges, but pled guilty to three Class D felony charges.

The petitioner's trial counsel was the first witness at the post-conviction hearing. Trial counsel testified that he met with petitioner several times. The district attorney made several offers for a plea agreement before the petitioner accepted one. At one point, the district attorney made an offer of a set number of years, but the petitioner rejected it. Trial counsel testified that the petitioner was very adamant about what he thought the facts would show and what he would or would not take in plea negotiations. Trial counsel believed that what petitioner thought the facts were and what the facts actually were did not match up. Trial counsel did recall that the plea offer for a set number of years got rid of the petitioner's Class A felonies and also took away the risk of consecutive sentencing.

According to trial counsel, there was a transcript of a telephone conversation presented at the sentencing hearing, but that conversation occurred after the entry of the petitioner's plea and before the sentencing hearing. There were also pictures of letters that were given as part of discovery. Trial counsel stated that he presented these letters to the petitioner to review. Trial counsel believed that the letters presented at the sentencing hearing had been included in the discovery package. Trial counsel testified that the only surprise at the sentencing hearing was the pictures of drawings in the petitioner's jail cell. Trial counsel also testified that both he and petitioner's prior trial counsel warned petitioner that any telephone calls he made while in jail would be recorded.

Trial counsel cannot recall how many State's witnesses were in the courtroom during the sentencing hearing. The witnesses were not sequestered. Trial counsel asked the petitioner if he wanted the witnesses out of the courtroom. The petitioner replied that he wanted his parents in the courtroom. Trial counsel explained it was all the witnesses or none. The petitioner repeated that he wanted his parents there, so trial counsel did not ask for the sequestration of witnesses.

Trial counsel stated that he and the petitioner discussed all of the petitioner's charges and the ranges of punishment. They added up the possible penalties in the worst case scenario and the best case scenario. Trial counsel also told the petitioner that he believed the petitioner ran a substantial risk of the worst case scenario.

Trial counsel stated that he had no doubts that the petitioner knew exactly what the risks were. Trial counsel believed that it was a knowing and voluntary guilty plea. Trial counsel stated that the petitioner was told his sentence could be as little as six years or as many as thirty years as a result of the plea. Those figures were the same as discussed by trial counsel and petitioner.

The petitioner also testified at the post-conviction hearing. He alleged that trial counsel did not supply the letters written by him from jail to others outside jail. The petitioner referred specifically to letters written by him prior to the entry of his plea agreement. The petitioner did know what was in the letters and did know that they were incriminating. He also admitted that he made telephone calls, which were recorded, during the time between his plea and the sentencing hearing. There were also pictures made of graffiti in the petitioner's jail cell that he allegedly drew. This also occurred between the guilty plea and the sentencing hearing.

The petitioner stated that his only complaint was that he had not been supplied the content of the letters prior to his plea. The petitioner maintained at the post-conviction hearing that he would not have pled guilty and agreed to be sentenced by the trial judge if he had known about the letters. He would have taken the plea bargain offered with a sentence for a set number of years. The final offer, prior to the offer he accepted, had been for sixteen years, to serve.

At the post-conviction hearing, the petitioner stated, "I knew I was guilty. I just thought I had a better chance of getting it lowered in a sentencing hearing, and what I thought they had against me didn't seem like it would be enough to bring it up over 16 years, so" The petitioner determined that the content of the letters was the basis for his thirty year sentence because the trial court referenced them several times during the sentencing.

The petitioner denied his trial counsel's assertion that he was shown the letters prior to the plea agreement. He did say that he received a copy of each letter after the sentencing. The petitioner also denied his trial counsel's assertion that he wanted his parents in the courtroom. However, the petitioner did not tell his attorney that he wanted the witnesses sequestered.

The petitioner stated that he did not understand the court proceedings during his plea and did not understand his plea when his trial counsel went over the guilty plea form with him.

At the conclusion of the post-conviction hearing, the post-conviction court denied the petitioner's petition for post-conviction relief. The petitioner filed a timely notice of appeal.

ANALYSIS

On appeal, the petitioner alleges that this plea was involuntary and unknowing because his trial counsel was ineffective. The petitioner alleges that trial counsel did not know about all the evidence that would be presented at his sentencing hearing. This evidence consisted of threatening letters written by the petitioner prior to entry of the guilty plea. He also complains that counsel did not know or inform the petitioner about threatening telephone calls and photographs of graffiti drawn by the petitioner after the entry of this guilty plea, but before the sentencing hearing.

A post-conviction court's findings of fact are conclusive on appeal unless the evidence preponderates otherwise. See State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999). During our review of the issue raised, we will afford those findings of fact the weight of a jury verdict, and this Court is bound by the court's findings unless the evidence in the record preponderates against those findings. Momon v. State, 18 S.W.3d 152, at 156 (Tenn. 1999); Henley v. State, 960 S.W.2d 572, 578 (Tenn. 1997); Alley v. State, 958 S.W.2d 138, 147 (Tenn. Crim. App. 1997). This Court may not reweigh or re-evaluate the evidence, nor substitute its inferences for those drawn by the post-conviction court. Momon, 18 S.W.3d at 156; State v. Honeycutt, 54 S.W.3d 762, 766 (Tenn. 2001). However, the post-conviction court's conclusions of law are reviewed under a purely de novo standard with no presumption of correctness. See Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001).

Once a guilty plea has been entered, effectiveness of counsel is relevant only to the extent that it affects the voluntariness of the plea. In this respect, such claims of ineffective assistance necessarily implicate the principle that guilty pleas be voluntarily and intelligently made. See Hill v. Lockhart, 474 U.S. 52, 56 (1985) (citing North Carolina v. Alford, 400 U.S. 25, 31 (1970)). As stated above, in order to successfully challenge the effectiveness of counsel, the petitioner must demonstrate that counsel's representation fell below the range of competence demanded of attorneys in criminal cases. See Baxter, 523 S.W.2d at 936. Under Strickland v. Washington, 466 U.S. 668, 694 (1984), the petitioner must establish: (1) deficient representation; and (2) prejudice resulting from the deficiency. However, in the context of a guilty plea, to satisfy the second prong of Strickland, the petitioner must show that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill, 474 U.S. at 59; see also Walton v. State, 966 S.W.2d 54, 55 (Tenn. Crim. App. 1997).

The post-conviction court found that the petitioner's testimony regarding his letters not being supplied to him by trial counsel, as well as his not being informed of the phone calls and graffiti was simply not credible. In addition, the post-conviction court stated that trial counsel testified that both he and previous trial counsel told the petitioner not to write letters or make telephone calls because they could be used against him. The trial court found that in fact trial counsel had gone over the letters with the petitioner. Therefore, the post-conviction court concluded that the petitioner did in fact know that the State was in possession of the letters. Moreover, the telephone calls and the drawings in the petitioner's cell were not made until after he entered his guilty plea, but before sentencing. We cannot see how evidence that did not exist at the time of the entry of the guilty plea

could effect its voluntariness. This is especially so when the petitioner was the source and creator of the evidence in question.

Trial counsel also testified that he went over the guilty plea forms with the petitioner and that the petitioner understood exactly what the risks were. He informed the petitioner that his sentence could be anywhere from six to thirty years. The post-conviction court is in a position to judge credibility of witnesses, and we cannot substitute our own judgement for the post-conviction court's. Momon, 18 S.W.3d at 156.

We hold that the petitioner was afforded the effective assistance of counsel. The petitioner has not shown that but for any errors on the part of counsel, of which we have found none, he would not have pled guilty.

CONCLUSION

For the reasons set out above, we affirm the judgment of the post-conviction court.

JERRY L. SMITH, JUDGE